IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MKUYE, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 96 OF 2021

PETER KIHANDA ..... 1ST APPELLANT

RAMADHANI BAKARI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Masaju, J.)

dated the 30th day of December 2020

in

DC Criminal Appeal No. 155 of 2020

JUDGMENT OF THE COURT

28th November & 7th December, 2022

KOROSSO, J.A.:

Before us is a second appeal. It originates from the Resident Magistrate's Court of Dodoma sitting at Dodoma in Economic Case No. 37 of 2018 where the appellants, Peter Kihanda and Ramadhani Bakari were charged with the offence of Trafficking in Narcotic Drugs contrary to section 15(2) of the Drug Control and Enforcement (Amendment) Act, 2017 read together with the First Schedule and section 57(1) of the Economic and Organized Crime Control Act, [Cap 200 R.E. 2002, now R.E 2022] (the EOCCA). It was alleged that the appellants herein, on

19/5/2018 at Bahi Relini area along Dodoma- Singida Road within Bahi District in Dodoma Region, were found transporting narcotic drugs known as cannabis (Indian hemp) commonly known as *bhangi* weighing 161.06 kilograms.

The facts of the case as derived from the prosecution's twelve witnesses who testified at the trial is that the 2nd appellant was a driver of a lorry with a trailer employed by Simeera Company. His duties involved driving entrusted consignments to various destinations as directed by his employers. Seif Hamad Hemed (PW1) who was the 2nd appellant's supervisor, alluded that at the time of his arrest the 2nd appellant was a driver of a lorry with trailer no. T974 CVZ and Registration No. TIO5 CWL, make Benzio (the trailer lorry). On 19/5/2018, the 2nd appellant was driving the trailer lorry from Kahama enroute to Dar es Salaam with the 1st appellant as his passenger. Upon reaching the Bahi Police check-in, was stopped by traffic police officers, G6721 D/C Peter (PW3) and D. 6392 Cpl. Abdallah (PW4) who were conducting normal traffic routine check. When questioning the 2nd appellant, PW3 and PW4 became suspicious after smelling an unusual scent emitting from the lorry trailer and thus insisted on inspecting it despite being reassured by the 2nd appellant that there was nothing in the trailer lorry apart from the charcoal he carried.

The 2nd appellant on the pretext of properly parking the vehicle, drove away from the scene, an action that impelled PW3 and PW4 to report the incident to Asst Insp. Luka Keto (PW6), the District Traffic Officer (DTO) heeded the call and arrived at the scene of the incident soon after. PW6 joined the police officers to search for the runaway vehicle and the driver. The search team managed to trace the lorry trailer, abandoned on a feeder road, off the highway. The driver and the passenger were not in sight. A search ensued which subsequently, led to the apprehension of the 2nd appellant by the villagers who had been alerted about his disappearance. In the abandoned lorry trailer, six bags (popularly known as *shangazi kaja bags*) allegedly containing cannabis were uncovered on the back of the driver's seat. The 1st appellant was arrested the next day in Dodoma.

The seized six bags and the trailer lorry were first taken to the Police station at Bahi and then to Central Police Station Dodoma for storage. The six sacks in the trailer lorry were also taken to the Tanzania Bureau of Standards (TBS) offices by Insp. Malius Nyenza (PW 10) for weighing. At TBS they were received by Zadath Gharibu (PW12) an employee of TBS who was able to determine that the contents in the six sacks weighed 161.06 kilograms. The report on the weight of the seized sacks was

admitted as exhibit P11. The search of the trailer lorry conducted in the presence of the 2nd appellant led to various items being seized and recorded in the certificate of seizure which was admitted as exhibit P8. In addition, samples were removed from each of the six bags and were taken for analysis to the Chief Government Chemist Agency Office in Dar es Salaam by E. 2702 Cpl. Hafidhi (PW9). According to PW10, subsequently, the six sacks were handed to F. 4488 Cpl. Salum (PW8) the exhibit keeper.

With respect to the samples taken from the sacks, on arrival at the Chief Government Chemist Agency Office, PW9 handed them to Emmanuel Gwae (PW2), a Government Chemist. PW2 analyzed the samples received in six envelopes marked E1, E2, E3, E4, E5 and E6 accompanied by Form DCE 001. He then conducted the preliminary and confirmatory tests which revealed that the samples were *bhangi*, a narcotic drug. PW2 prepared a report which was admitted as exhibit P3. He also tendered the residual samples admitted as exhibit P2.

In defence, the 1st appellant denied any knowledge of the seized six sacks alleged to contain narcotic drugs. He testified that on 19/5/2018 he was at home in Kahama and then left from Kahama to Dodoma arriving at Dodoma on the same day his transport was a FUSO which also carried his bags of rice that he intended to sell. He denied having been a

passenger in the seized vehicle driven by the 2nd appellant, whom he claimed he had not known prior to being arraigned facing similar charges. His testimony included a narration of the circumstances leading to his arrest on 20/5/2018 at Dodoma. On the other hand, the 2nd appellant contended that on 19/5/2018 while driving to Dar es Salaam with the 1st appellant as his passenger, on reaching Bahi District at a Police check-in point, he was stopped by Traffic officers who asked to inspect the lorry trailer being suspicious of the luggage he carried, which belonged to the 1st appellant who had run away when the 2nd appellant was being questioned by the police officers at Bahi police check-in point. The 2nd appellant also narrated the circumstances surrounding his arrest.

The trial conducted against the 1st and 2nd appellants (then, 1st and 2nd accused persons) ended with a conviction for each of them for the offence charged and a sentence of life imprisonment. Aggrieved, their appeals to the High Court were unsuccessful, hence the instant appeal.

Each of the appellants filed a separate memorandum of appeal to this Court with a total of twenty-one grounds of appeal. Additionally, the 1st appellant filed another memorandum of appeal with ten grounds of appeal, and then his learned counsel on the date of hearing sought and was granted leave to file a supplementary memorandum of appeal with

five grounds. For the 2nd appellant, his counsel on 11/11/2022 filed a supplementary memorandum of appeal with three grounds. Suffice it to say, for reasons to be revealed hereinafter, we shall not replicate all the grounds of appeal. We shall reproduce three grounds of appeal that we firmly believe address the grievances of both appellants and can determine this appeal. Paraphrased and compressed these grievances are as follows: **One**, faults the two lower courts for sustaining the conviction of the appellants relying on the unsworn evidence of PW2 and PW3 in contravention of section 198 (1) of the Criminal Procedure Act [Cap 20 R.E 2019, now R.E. 2022] (the CPA). **Two**, the impropriety of the conviction of the 1st and 2nd appellants despite failure by the prosecution side to establish the chain of custody of the alleged seized narcotic drugs exhibit P7 and the P2; and **three**, failure of the prosecution to prove the offence charged facing the appellants beyond reasonable doubt.

On the day the appeal came for hearing, the 1st appellant was present in person and enjoyed the services of Mr. Barnabas Luguwa and Mr. Dickson Matata, learned advocates. The 2nd appellant was also present and represented by Mr. Leonard Mwanamonga Haule, learned advocate. Ms. Catherine Gwaltu, learned Principal State Attorney represented the

respondent Republic assisted by Mr. Meshack Lyabonga, learned State Attorney.

Regarding ground one, Mr. Matata who took lead in submitting for the 1st respondent began by faulting the trial court for failure to observe the dictates of section 198 (1) of the CPA since the record of appeal shows that at the trial, PW2 and PW3 did not take any oath or affirmation prior to giving their testimony. According to Mr. Matata, section 198 (1) of CPA dictates that before giving testimony, a witness must be sworn or affirmed. He expressed dissatisfaction with the first appellate court for not properly addressing the legal implication of failure to comply with the stated provision since the requirement is mandatory and not optional. The learned counsel for the 1st appellant relied on the case of **Mwiteka Godfrey Mwandemele v. Republic**, Criminal Appeal No. 388 of 2021 (unreported), argued that it restates the mandatory nature of the provision. He thus prayed that under the circumstances, the evidence of PW2 and PW3 be expunged from the record of appeal together with exhibits P2 and P3. He stated that expunging exhibit P3, the report issued by PW2, a Government Analyst who analyzed the seized items and determined them to be narcotic drugs was the crucial evidence founding the case for the prosecution.

According to Mr. Matata, if the Court grants the prayer and expunges the evidence of PW2 and PW3 and exhibits P2 and P3, it will mean there will be no conclusive proof that whatever substance or items alleged to have been seized from the 1st and 2nd appellants, were indeed narcotic drugs as claimed. He submitted that this is because, under section 48A (1) of the Drugs Control and Enforcement Act [Cap 95 R.E. 2019] (the DCEA), a Government Analyst is the one to issue a report upon the analysis of submitted samples of suspected narcotic drugs.

On the part of Mr. Haule, he commenced by supporting the submissions of the 1st appellant's counsel on ground one and reiterated the prayer for the Court to expunge the evidence of PW2 and PW3 and exhibits P2 and P3. Apart from the reasons advanced by the learned counsel for the 1st appellant, Mr. Haule referred us to the decision of this Court in **John Fortunatus Makoko v. GPH Industries Limited**, Civil Appeal No. 108 of 2018 (unreported). According to him, once the evidence of PW2 and PW3, exhibits P2 and P3 are expunged as prayed it will render the charge against the 2nd appellant not proved since there will be no evidence that establishes that the seized six sacks allegedly belonging to the appellants did indeed contain narcotic drugs as charged, he urged the Court to so find.

In response, Mr. Lyabonga who submitted for the respondent Republic from the outset expressed his support for the appeal. On ground one, he conceded to the anomaly outlined by the learned counsel for the 1st and 2nd appellants that PW2 and PW3 testified without oath or affirmation contrary to the law. The learned State Attorney argued that since the nature of the evidence of PW2, a government analyst, related to the subject matter of the offence charged against the appellants, that is, proving that the six sacks seized from them contained cannabis (*bhangi*) narcotic drugs, it follows that where the evidence of PW2 and exhibits P2 and P3 are expunged, proving the charge facing the appellants will be an impossible task with the remaining evidence. He argued that his position is accentuated upon reading the provisions of section 48A of the DCEA, which he argued, essentially stipulate that the report of the government analyst as it relates to the analysis made on a specific substance is final and conclusive. He thus supported the prayer by the learned counsel for the 1st and 2nd appellants that the evidence of PW2 and PW3 be expunged from the record together with the exhibits tendered by PW2, that is, P2 and P3 for the alluded to infractions.

In our deliberation on ground one, having heard the counsel from both sides on the anomaly raised and perused through the record of

appeal pages 23 and 26, we are satisfied that at the trial, two witnesses, Emmanuel Gwae (PW2) and G 6721 D/C Peter (PW3) who were recorded as Christians, did not take oaths prior to giving their testimonies. The omission essentially controverted the tenor of section 198(1) of the CPA which stipulates thus:

> *"Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act."*

Another relevant provision relevant for our purpose is section 4(a) of the Oaths and Statutory Declaration Act [Cap 34 R.E. 2019] (the Oaths Act) stating:

> *"4. Subject to any provision to the contrary contained in any written law, an oath shall be made by:*
>
> *(a) any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court."*

The mandatory nature of section 198(1) of the CPA has been discussed in various decisions of this Court including in **Nestory**

Simchimba v. Republic, Criminal Appeal No. 454 of 2017 (unreported) and **John Fortunatus Makoko** (supra).

In **John Fortunatus Makoko** (supra), the Court referred to the case of **Catholic University of Health and Allied Sciences (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020 (unreported) where it was confronted with a similar situation and stated:

> *"Where the law makes it mandatory for a person who is a competent witness to testify on oath, the omission to do so vitiates the proceedings because it prejudices the parties."*

In the case of **Hamisi Chuma @Hando Mhoja and Another v. Republic,** Criminal Appeal No. 371 of 2015 (unreported), the Court referred its decision in **Khamisi Samweli v. Republic,** Criminal Appeal No. 320 of 2010 (unreported) where it was observed:

> *"Every witness in a Criminal Cause or matter shall be examined either on oath or affirmation subject to the provisions of any other written law to the contrary."*

Accordingly, it goes without saying that in the instant case, having found that PW2 and PW3 did not take an oath as prescribed by the law renders their evidence to be valueless. We thus agree with the rival

counsel for the parties that PW2 and PW3's evidence should be discounted. We find merit in this ground of appeal. Henceforth, we shall discount the evidence of PW2 and PW3 and exhibits P2 and P3 from the record. Furthermore, having expunged the evidence of PW2 and PW3 from the record, consequential to this is that exhibits P2 and P3 which were tendered by PW2, namely, the six samples alleged to be cannabis "*bhangi*" which were analysed by PW2 and the report with analysis of the samples respectively, are also expunged from the record.

Indeed, with the above findings the next issue for our deliberation is whether in the absence of the expunged evidence of PW2, PW3 and exhibits P2 and P3 the remaining evidence was sufficient to prove the prosecution case beyond reasonable doubt. The learned counsel for the 1st and 2nd appellants and the learned State Attorney agreed that the absence of the expunged evidence renders the offence charged against the appellants unproven. The learned counsel argument being that upon expunging the evidence of PW2 and PW3 and exhibits P2 and P3 from the record, the evidence remaining to prove the case against the appellants is insufficient and does not meet the required standard. To augment their assertion on the weakness of the remaining prosecution evidence, the

counsel for the parties contended that the available prosecution evidence cannot sustain the appellants' convictions.

On the part of Mr. Matata, he argued that in the instant appeal, there are various irregularities in the proceedings including the fact that the chain of custody of the six sacks alleged to contain narcotic drugs was not proved to have been unbroken. He contended that what can be gathered from the evidence is that the trailer lorry (exhibit P6) driven by the 2nd appellant and the 1st appellant as the passenger was seized in the presence of the 2nd appellant and an independent witness Victor Leonard Chambi (PW7) whilst the 1st appellant was absent. The learned counsel claimed that the evidence on the seizure of the lorry trailer containing the six sacks (exhibit P7) was testified by PW3, PW4 and PW7 who was an independent witness, spearheaded by PW6. He argued that the evidence related to the chain of custody of exhibit P7 has a lot of gaps in terms of storage, transfer, and control of the seized exhibits. The learned counsel contended that there was no evidence adduced on who controlled the movement of the exhibits and its storage from the time of seizure up to the time of handing over to F4488 Cpl. Salum (PW8), the custodian of exhibits at Dodoma Central Police Station.

According to the learned counsel for the 1st appellant, whilst PW8 testified that he had received six "*shangazi kaja*" bags on 20/5/2018 from F.9788 DCPL Fabian (PW11) and that the said exhibits remained under his control until 10/9/2015 when they were taken to court during the trial, the assertion was not supported by evidence. He argued that the evidence does not show that exhibit P7 was in the sole custody and control of PW8 during the period stated since there is evidence that the exhibits were taken to be weighed during the same period without an explanation on how they were taken from the custody of PW8. At the same time there is evidence that during the period exhibit P7 was said to be under the custody of PW8, some samples were taken from the six sacks. PW8 as a custodian of the exhibits was silent on the exhibits being taken to be weighed and samples having been taken therefrom. All this he argued leaves unanswered questions and gaps in the chain of custody of exhibit P7.

The learned counsel argued further that there is also no evidence on record to show where PW11 got exhibit P7 for him to hand it to PW8 as per his testimony. Additionally, the learned counsel interrogated the absence of evidence to show how exhibit P7 moved from Police post-Bahi where it was seized to Dodoma Central Police and handed to PW8 for

storage. He thus argued that the chain of custody was broken and the case against the 1st appellant remained unproven. He relied on the case of **Agnetha Sebastian v. Republic**, Criminal Appeal No. 389 of 2020 (unreported) to reinforce this stance. He thus concluded that the fact that the chain of custody of the subject matter of the case was compromised, renders the case against the appellant not proved beyond reasonable doubt. He thus implored the Court to quash the conviction and set aside the sentence imposed on the 1st appellant.

Mr. Haule on the other hand commenced by expressing his support of the learned counsel for the 1st appellant's submissions on grounds two and three. He asserted that the chain of custody of exhibit P7 was not proved to have been unbroken which rendered the case against the 2nd appellant not proved to the standard required. The learned counsel argued that the fact that the certificate of seizure (exhibit P8) did not show the handing over of the seized items from those who seized them to PW8 for storage is a gap in the chain of custody of exhibit P7. Mr. Haule also alluded to the fact that there is no evidence that reveals who picked the samples from PW8 or where they were stored at the time. It was his contention that the gaps in the chain of custody of exhibit P7 raise doubts on whether the samples sent to Dar es Salaam for analysis and received

by PW2 were indeed from the six sacks seized from the trailer lorry. He thus implored the Court to find that the chain of custody for exhibits P7 and P2 was compromised and essentially weakens the prosecution evidence. He implored the Court to find that under the circumstances, the case against the 2nd appellant remained unproven and thus the appeal be allowed, conviction quashed and sentence set aside.

On his part, the learned State Attorney submitted that the fact that the evidence on the chain of custody of exhibit P7 is engrained in doubts is what prompted the respondent Republic side to support the contention by the learned counsel for the 1st and 2nd appellants that the prosecution case against the appellants was not proved. He contended that gaps in the evidence related to the chain of custody include the fact that while PW6 adduced that he handed the six sacks to the OCS Bahi though without naming the specific OCS Bahi he had handed exhibit P7. Furthermore, the said OCS Bahi did not testify on who handed him the said exhibit and to whom he himself handed them thereafter, he contended. Mr. Lyabonga asserted that the other gaps that show that the chain of custody of exhibit P7 was not intact, include the unanswered questions on how the seized exhibits moved from Bahi to Dodoma to be stored by PW8, the exhibit custodian on 20/5/2021. That even though

PW8 had testified that he had stored the exhibits up to 10/9/2021 there is evidence from PW10 that on 21/5/2021 the exhibits were taken to TBS offices for weighing, however, there is no clarity on how they were taken from PW8's custody and thereafter, how they were handed back to him. This he argued clearly shows that there was a break in the chain of custody, which culminates in failure by the prosecution to show the chain of custody and essentially to prove the case. He thus urged us to find that the most probable and judicious way under the circumstances is to quash the conviction, set aside the sentence, and set free the appellants.

Indeed, having carefully considered the submissions from the learned counsel of the contending sides on grounds two and three, certainly, there are numerous decisions of this Court that have set in place guidelines and conditions when scrutinizing the chain of custody of an exhibit. Some of these decisions have been cited by the counsel for the rival sides in this appeal. In the case of **Paulo Maduka and 3 Others v. Republic**, Criminal Appeal, No. 110 of 2007 (unreported), the Court discussed the import of chain of custody stating:

> "*By chain of custody' we have in mind chorological documentation and or paper trail showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic. The idea behind*

recording the chain of custody, it is stressed, is to establish that the alleged evidence is in fact related to the alleged crime rather than, for instance having planted fraudulently to make someone appear guilty."

See also, **Zainab Nassor @ Zena v. Republic**, Criminal Appeal No. 348 of 2015, **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015, **Makoye Samwel @ 15 Kashinje and Kashindye Bundala v. Republic**, Criminal Appeal No. 32 of 2014; **Abas Kondo Gede v. Republic**, Criminal Appeal No. 472 of 2017 and **Chacha Jeremiah Murimi and 3 Others v. Republic**, Criminal Appeal No. 551 of 2015 (all unreported).

It suffices that, as discerned from the various decisions of the Court, the chain of custody is established when there is proper documentation of the chronology of events in the handling of the exhibit from seizure, control, and transfer until tendering in court at the trial. The cited authorities above also inform us that although the chain of custody can be proved by way of the trail of documentation, this is not the only criterion when dealing with exhibits, other factors must be considered while cautioning ourselves that ascertaining chain of custody of an exhibit is effectively as expounded in **DPP v. Stephen Gerald Sipuka**, Criminal Appeal No. 373 of 2019 (unreported):

"to show to a reasonable possibility that the item that is finally exhibited in court and relied on as evidence, has not been tampered with along the way to the court."

In the instant case, undoubtedly there are breaks in the chain of custody of exhibit P7 as expounded by the learned counsel for the appellants and the learned State Attorney. Apart from the absence of the paper trail for every step from the stage of seizure of the six sacks allegedly containing narcotic drugs, there gaps in terms of who and under whose control the exhibits were transferred from Bahi to Dodoma Central Police station. There is also another gap in the transfer from PW8 to other witnesses who encountered exhibit P7 without any record. Thus, confirming a break in the chain of custody. As held in **Onesmo Mlwilo v. Republic**, Criminal Appeal No. 213 of 2010 (unreported), where there is no proof of the chain of custody of the items found without a proper explanation of the custody of the exhibits, there will be no cogent evidence to prove the authenticity and intactness of such evidence as the case on hand. For the foregoing, certainly, justice demands that this is not a proper case to order a retrial. In the circumstances, we find merit in grounds two and three.

In fine, the appeal by the 1st and 2nd appellants is hereby allowed. The convictions by the trial court which were upheld by the first appellate court are hereby quashed. The sentence of life imprisonment imposed against the appellants is set aside. We order that the appellants be released from custody forthwith unless held therein for other lawful cause.

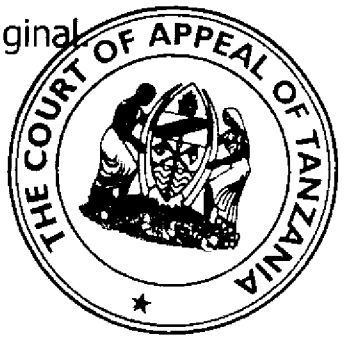
DATED at **DODOMA** this 7th day of December, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered on 7th day of December, 2022 in the presence of Majaliwa Wiga, holding brief for Mr. Barnabas Luguwa, learned counsel for the 1st Appellant and Mr. Leonard Haule, learned counsel for the 2nd appellant, Mr. Ahmed Hatibu, learned State Attorney for the respondent/ Republic, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL